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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JONATHAN WAYNE BOTTEN, SR.;
TANJA DUDEK-BOTTEN;
ANNABELLE BOTTEN; and J.B., a
minor by and through his guardian
JONATHAN WAYNE BOTTEN, SR.,

Plaintiffs,

vs.

STATE OF CALIFORNIA; COUNTY
OF SAN BERNARDINO; ISAIAH
KEE; MICHAEL BLACWOOD;
BERNARDO RUBALCAVA;
ROBERT VACCARI; JAKE ADAMS;
and DOES 1-10 inclusive,

Defendants.

CASE NO. 5:23-cv-00257-KK-(SHKx)

Assigned for All Purposes to:
Hon. Kenly Kiya Kato– Courtroom #3

**COUNTY DEFENDANTS' REPLY
IN SUPPORT OF COUNTY
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE SUMMARY
ADJUDICATION**

*[Concurrently Filed with Objections to
Plaintiffs' Evidence]*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiffs have conceded as they must, no ammunition of any kind fired by Defendants Vaccari and/or Adams directly caused any injuries to the Botten family.¹ (UMF 54, 57, 90, 91-94, 102-103, 109). Yet, Plaintiffs persist in asserting their Negligence and Negligent Infliction of Emotional Distress claims against the County Defendants based solely on the theory that if either Adams or Vaccari made any tactical errors during their encounter with Puga, they are somehow responsible for any and all injuries incurred by third parties arising out of the actions of all other law enforcement officers on scene, and by extension the County also becomes liable for the actions of another entity's employees. Tellingly, Plaintiffs have offered no case law to support this novel theory nor does public policy warrant such a far reaching extension of duty. *See, Brown v. USA Taekwondo*, 11 Cal. 5th 204, 209 (2021) (courts must "determine whether relevant policy considerations counsel limiting that duty."). Further, as detailed more fully below, Plaintiffs' opposition wholly ignores several of the County Defendants' arguments, any one of which is dispositive of this matter. *See, Safeco Ins. Co. of Am. v. Air Vent, Inc.*, 616 F. Supp. 3d 1079, 1084 (D. Nev. 2022) ("The movant need only defeat one element of a claim to garner summary judgment).

II. PLAINTIFFS FAILED TO ADDRESS THE CHP DEFENDANTS WERE THE SUPERSEDING CAUSE OF THEIR INJURIES

As set forth in County Defendants moving papers, regardless of any alleged tactical negligence by Vaccari and/or Adams, the actions of the CHP Defendants in shooting toward the Botten house was a superseding cause thereby removing any

¹ UMF-109 – The 9mm pistol bullets fired by Deputy Adams can be excluded as the source of the Botten family injuries - UNDISPUTED

UMF-103 – Sergeant Vaccari did not discharge his firearm - UNDISPUTED

1 liability as to County Defendants. *See, Martinz v. Vintage Petroleum Inc.*, 68 Cal.
2 App. 4th 695, 700-701 (1998) (“Intervening negligence cuts off liability, and becomes
3 known as the superseding cause, if “it is determined that the intervening cause was
4 not foreseeable and the results which it caused were not foreseeable . . .”).

5 Nowhere in Plaintiffs’ opposition do they even bother to address, let alone
6 refute the issue of CHP being a superseding cause of the Botten’s injuries when they
7 failed to clear their background before shooting as they were admittedly trained to do.
8 “Ordinarily, foreseeability is a question of fact for the jury. It may be decided as a
9 question of law only if, ‘under the undisputed facts there is no room for a reasonable
10 difference of opinion.’” *Bigbee v. Pacific Tel. & Tel. Co.*, 34 Cal.3d 49, 55–56 (1983).
11 Here, there are such undisputed facts as there can be no question that the County
12 Defendants’ bullets did not make contact with the Plaintiffs (UMF 53, 103, 109), and
13 therefore it was the CHP officers who physically injured the Plaintiffs (UMF 77-79,
14 91-92, 104, 107-108, 112, 116; Opp. 29:11-14).

15 Further, even Plaintiffs concur it is well known that officers are trained to clear
16 their background before shooting. (Opp. 29:28-30:2 – “officers are trained to be
17 aware of their background when using deadly force to avoid injury to innocent
18 bystanders”). Thus, Defendants Vaccari and Adams had every right to expect that the
19 other officers on scene would utilize this training and not shoot without clearing their
20 background. Stated otherwise, it was not foreseeable that the CHP Defendants would
21 shoot in a manner that endangered the Bottens.

22 Because a superseding cause entirely absolves County Defendants of liability
23 and Plaintiffs entirely failed to address this argument by the County Defendants, the
24 Court should dismiss Plaintiffs’ claims against the County Defendants and treat any
25 argument the CHP Defendants were not the superseding cause as waived. *Lessin v.*
26 *Fort Motor Company*, 2024 WL 4713898 *4 (S.D. Cal. Nov. 7, 2024) citing *Novalk,*
27 *LLC v. Kinsale Ins. Co.*, 2021 WL 4134741, *2 (S.D. Cal. Sep. 10, 2021); *Pacific*

1 *Dawn LLC v. Pritzker*, 831 F.3d 1166, n. 7 (9th Cir. 2016).

2 **III. COUNTY DEFENDANTS MET THEIR BURDEN ON SUMMARY**
3 **JUDGMENT AND THERE IS NO TRIABLE ISSUE OF**
4 **MATERIAL FACT**

5 While Plaintiffs have lodged numerous objections and engaged in trivial
6 disputes regarding the verbiage used by Defendants to explain to the Court how the
7 County Defendants came into contact with decedent Puga, none of these “disputes”
8 are material to the claims made by the Bottens against the County Defendants. *See*,
9 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *see also, T.W. Elec.*
10 *Serv., Inc. v. Pac. Elec. Contractors Ass’n.*, 809 F.2d 626, 630 (9th Cir. 1987)
11 (“Disputes over irrelevant or unnecessary facts will not preclude a grant of summary
12 judgment.”).

13 What is material is that the physical injuries sustained by the Bottens were
14 undisputedly not inflicted by either Defendant Vaccari or Adams². (UMF 54, 57, 90,
15 91-94, 102-103, 109). Thus, the only question that remains is should the County
16 Defendants be held responsible for the injuries unintentionally inflicted by the CHP
17 Defendants if it is determined that the County Defendants employed any negligent
18 tactics when confronting Puga, in the absence of any controlling authority warranting
19 such liability. County Defendants submit through their briefing in this matter that the
20 answer is clearly no.

21 **IV. PLAINTIFFS MAY NOT MAINTAIN THEIR NEGLIGENCE AND**
22 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIMS**

23 **A. No Duty**

24 Plaintiffs have not cited any case law that the County Defendants had a duty to
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26 ² The County is only named as a Defendant based on the actions of its
27 employees. *See Government Code*, § 815.2(a). As such, if the employees are not
28 negligent, then the claim against Defendant County of San Bernardino fails as well.

1 protect third parties from the CHP officers' use of force. *Lopez v. City of San Diego*,
2 190 Cal. App. 3d 678, 681 (1987) ("where the gravamen of the complaint is a police
3 failure to act reasonably in protecting members of the public from harm caused by a
4 third person (i.e., non-feasance), a series of recent Supreme Court cases make clear
5 that liability of the governmental entity is narrowly circumscribed.")(emphasis
6 added). Plaintiffs instead cite to general negligence case law to assert that broadly
7 "all persons are required to use ordinary care to prevent others from being injured as
8 the result of their conduct." Opp. 22:3-9 citing *Bastian v. Cnty. of San Luis Obispo*,
9 199 Cal. App. 3d 520, 530 (Ct. App. 1988).

10 However, the current state of the law is that "one has no duty to come to the
11 aid of another. A person who has not created a peril is not liable in tort merely for
12 failing to take affirmative action to assist or protect another unless there is some
13 relationship between them which gives rise to a duty to act." *Zelig v. Cnty. of Los*
14 *Angeles*, 27 Cal.4th 1112, 1129 (2002) quoting *Williams v. State of California*, 34
15 Cal.3d 18, 23 (1983); *Lopez v. City of San Diego*, 190 Cal. App. 3d 678, 681 (1987)
16 ("Generally, there is no legal duty and hence no liability for negligence, unless there
17 is a special relationship between the police and either the victim or the third person
18 which gives rise to a responsibility to control the third person's conduct.").

19 Here, Plaintiffs do not argue and therefore implicitly concede, as they must,
20 that no special relationship existed between the County Defendants and the Bottens.
21 (Opp. 26:10-17 – arguing that a special relationship is not required to impose a duty).
22 "Such a relationship exists when law enforcement officer's promise or conduct
23 induces detrimental reliance by the plaintiff." See, *Bastian v. County of San Luis*
24 *Obispo*, 199 Cal. App. 3d 520, 529 (1988) citing *Williams v State of California*, 34
25 Cal. 3d 18, 23 (1983). Once again, there is no dispute that County Defendants never
26 made contact with the Bottens or commanded them to take any action. (UMF 58-59-
27 Undisputed); *Lopez v. City of San Diego*, 190 Cal. App. 3d 678, 681 (1987) (special
28

1 whether to impose a duty as a matter of law, “. . . a court might conclude that duty
2 should not be imposed because, for example, the type of harm the plaintiff suffered
3 was unforeseeable, or because there was no moral blameworthiness associated with
4 the defendant's conduct, notwithstanding the defendant's special relationship to the
5 plaintiff. Put differently, even when a special relationship gives rise to an affirmative
6 duty to protect, a court must still consider whether the policy considerations set out in
7 *Rowland* warrant a departure from that duty in the relevant category of cases.” *Brown*
8 *v. USA Taekwondo*, 11 Cal. 5th 204, 222 (2021).

9 Plaintiffs lumping together the actions of the CHP Defendants and the County
10 Defendants address only whether the Botten’s injuries were foreseeable, ignoring the
11 remainder of the Rowland factors. As set forth in Defendants’ moving papers, the
12 foreseeability test is not met here, nor do the remainder of the factors not addressed
13 by Plaintiffs support an imposition of duty here.

14 As to foreseeability, Plaintiffs have offered nothing to dispute that the County
15 Defendants had a reasonable expectation that the CHP Defendants would not shoot
16 without clearing their background, something they concede all law enforcement
17 officers are trained to do. Plaintiffs likewise concur the Court’s foreseeability analysis
18 must consider “whether the *category* of negligent conduct at issue is sufficiently likely
19 to result in the *kind* of harm experienced that liability may appropriately be imposed
20 on the negligent party.” *Staats v. Vintner's Golf Club, LLC*, 25 Cal. App. 5th 826,
21 837 (2018) (emphasis in original); (Opp. 26:27-27:4 - *in accord*). Here, the alleged
22 negligent conduct Plaintiffs attribute to the County Defendants all pertain to harm
23 posed by Puga. For example, Plaintiffs contend that Defendants knew Puga was
24 dangerous and barricaded in the neighborhood and that there can be harm to
25 bystanders from a barricaded suspect. (Opp. 27:15-22). To mitigate this harm, the
26 County Defendants should have, according to Plaintiffs, requested back up, set up a
27 perimeter, and/or evacuated all uninvolved individuals. (Opp. pgs. 26-27). However,

1 all of these acts that Plaintiffs contend were “negligently” not performed by County
2 Defendants are aimed at protecting the public from the armed dangerous suspect –
3 Hector Puga.

4 However, the Bottens were not injured by Puga. The County Defendants have
5 put forth evidence that CHP Sergeant Kee was the likely source of the Botten’s injuries
6 (UMF 107). This was disputed by Plaintiffs only to the extent that they seem to
7 believe CHP Defendant Rubalcava may have also injured them (Opp. 29:11-14 –
8 “Kee and Rubalcava were the only officers who shot in the direction of the Botten
9 Residence”), regardless, it was not Sergeant Vaccari, Deputy Adams, or Puga. In
10 short, the category of “negligent” conduct alleged as to Defendants Vaccari and
11 Adams were designed to prevent the “kind” of harm that would be posed by Puga, not
12 other law enforcement officers. Again, the kind of harm here was not foreseeable
13 under the circumstances presented. *See Golick v. State of California* 82 App. 5th 1127,
14 1148 (2022) (“In volatile situations, one can always argue that the arrival of police
15 officers caused incremental increase in tension at the scene, and thus increased the
16 risk of injury occurring, and whenever tragedy ensues one can argue that a different
17 police response would have produced a better outcome. But this sort of speculative,
18 after-action critique falls short” in subjecting an officer to tort liability for negligence).

19 Plaintiffs only cited cases of *Green v. City of Livermore*, 117 Cal. App. 3d 82
20 (1981) and *Rose v. Cnty of Plumas*³, 152 Cal. App. 3d 999, 1006 (1984) are
21 distinguishable and do not support the imposition of a duty here. In *Greene*, the
22 Court found the City could be held liable for the negligent conduct of its officers
23 during a DUI investigation when officers failed to remove the keys from the vehicle.
24 *Greene*, 117 Cal. App. at 88 (“a public entity may be liable for the nonfeasance of its
25

26 ³ It should also be noted that both *Greene* and *Rose* were challenges on a Demurrer
27 as to whether Plaintiff had sufficiently stated a claim, not whether there was a duty
28 based on undisputed evidence at summary judgment.

1 employees.”). Unlike in *Greene*, Plaintiffs are seeking to hold the County
2 responsible, not for the acts of its own employees, but for the alleged acts of the CHP
3 officers in shooting toward the Botten residence.

4 In *Rose*, the court made clear that “the primary issue on appeal is whether
5 police officers have an affirmative duty to render emergency aid to an injured person
6 found at the scene of an investigation.” 152 Cal. App. 3d at 1003-1004 (1984).⁴ There
7 are no arguments here that County Defendants failed to provide medical care once the
8 Bottens were injured and therefore the entire analysis in *Rose* is inapplicable.

9 Further, Plaintiffs’ limited analysis as to alleged tactical errors by the County
10 Defendants does not address any of the other *Rowland* factors that are to be analyzed
11 before imposing duty as a matter of law. Consistently, courts have used the following
12 factors to determine foreseeability of harm to the plaintiff: the degree of certainty that
13 the plaintiff suffered injury, the closeness of the connection between defendant’s acts
14 and the harm suffered by plaintiff, the moral blame attached to the defendant’s
15 conduct, the policy of preventing future harm, the extent of the burden to the
16 defendant, and the consequences to the community of imposing a duty to exercise
17 care with resulting liability for breach, and the availability, cost, and prevalence of
18 insurance for the risk involved. *Rowland v. Christian*, 69 Cal.2d 108, 112-113 (1968);
19 *Bastian v. Cnty. of San Joaquin*, 199 Cal.App.3d 520, 530 (1988). No factor other
20 than foreseeability was discussed by Plaintiffs.

21 As previously stated, it was wholly unforeseeable to the County deputies that
22 CHP would have abandoned their training on clearing background before shooting.

23 _____
24 ⁴ The *Rose* court concluded that “the essence of plaintiff’s argument is simply that
25 once the police undertake an investigation, and during the course of that investigation
26 they discover a person wholly ‘dependent upon them for emergency aid, they are
27 under a duty to render aid. We disagree.” *Id* at 1004. Nevertheless, the Court of
28 Appeals reversed the grant of the demurrer only because it believed leave to amend
should have been granted.

1 Even further, Plaintiffs' opposition does not state a single policy consideration that
2 would be furthered by imposing a duty on the County Defendants here. This omission
3 is likely because, as already set forth in Defendants moving papers, policy
4 considerations dictate against Plaintiffs' position. Plaintiffs have offered no evidence
5 to support that the Bottens, or anybody else would have been safer, if resources were
6 employed to remove them from their home when Puga was in the vehicle potentially
7 armed or that there should always be a duty to evacuate when a suspect is barricaded,
8 regardless of the circumstances. Arguably everyone would have been in greater harm
9 if Puga decided to start shooting mid-evacuation, as opposed to remaining inside their
10 homes away from the scene.

11 Nor are the interests of justice served here by holding the County and its
12 taxpayers accountable for the actions of a separate and independent law enforcement
13 agency. Indeed, there is a policy consideration to not extend liability to the County
14 deputies – Plaintiffs can be made whole if they prove their claims as to the CHP
15 Defendants without the need to extend liability to the County.

16 There is certainly no moral blame to be assigned to County Defendants who
17 did not injure the Bottens, but were making the best tactical decisions they could when
18 dealing with an armed and dangerous Puga. Likewise, there is no closeness in
19 connection between tactical decisions made by the County Defendants over the course
20 of an hour, and the actual shooting injuries sustained by the Bottens. Again, it would
21 be rank speculation to state that a shooting would not have occurred or that the Bottens
22 would not had been injured if different approaches were taken as to Puga.

23 The totality of the Rowland factors clearly counsels against imposing a duty as
24 to the County Defendants here.

25 **C. County Defendants were Not the Proximate Cause of the Botten's**
26 **Injuries**

27 Under settled case law when multiple officers fire shots, only those officers that
28

1 directly caused the injury are responsible under a negligence theory. *See, Lopez v.*
2 *City of Los Angeles*, 196 Cal.App.4th 675, 682, 688 (2011) (“It as undisputed that
3 Gallegos, Perez, or Sanchez fired the fatal shot. Therefore appellant cannot establish
4 liability for negligence or wrongful death based on O’Sullivan’s shot) citing *Munoz v.*
5 *City of Union City*, 120 Cal. App 4th, 1077, 1093 (2004) (negligence cause of action
6 requires evidence that breach was proximate or legal cause of resulting injury). The
7 undisputed facts confirm the shots fired by Deputy Adams did not and could not have
8 caused the Botten injuries nor can it be said that any tactical decisions by the County
9 Defendants were a substantial factor in bringing the harm to the Bottens, without resort
10 to speculation.

11 V. COUNTY DEFENDANTS ARE ENTITLED TO STATUTORY
12 IMMUNITY

13 Cal. Gov. Code § 820.2 provides a public employee is immune for acts or
14 omissions that were the result of the discretion vested in him/her. Plaintiffs merely
15 cite to case law that deputies are not immune for their decision to arrest, without more.
16 However, this fails to account for Plaintiffs’ arguments here which all pertain to
17 whether the neighborhood should have been evacuated and other such decisions that
18 may have in hindsight moved the Botten’s away from their home. Plaintiffs have
19 offered nothing to support that such decisions were not discretionary and cloaked with
20 immunity under § 820.2, and by extension if the individual Defendants are immune,
21 so too is the County of San Bernardino. Cal. Gov. Code § 815.2(b).

22 VI. PLAINTIFFS DID NOT SUBSTANTIALLY COMPLY WITH THE
23 TORT CLAIMS ACT

24 Plaintiffs again, concede as they must, they “did not specifically allege
25 negligent pre-shooting tactics” in any way, shape or form in their tort claim. (Opp. p.
26 32:26-28). Instead, they argue this was not required because their negligent tactic
27 theory is subsumed within the same negligence cause of action that they utilize for the

1 shooting. Such an argument misses the point. If a plaintiff “relies on more than one
2 theory of recovery against the [governmental entity], each cause of action must have
3 been reflected in a timely claim. In addition, the “factual circumstances” set forth in
4 the written claim must correspond with the facts alleged in the complaint.” *Dixon v.*
5 *City of Livermore*, 127 Cal.App.4th 32, 40 (2005)(emphasis added); *Ortiz v. Lopez*,
6 688 F. Supp. 2d 1072, 1085 (E.D. Cal. 2010) (finding tort claim for intentional acts
7 did not put City on notice to investigate a claim of negligent hiring/negligent
8 supervision of its employees); *Fall River Joint Unified School Dist. v. Superior Court*,
9 206 Cal.App.3d 431, 435 (1988) (barring a cause of action that “patently attempts to
10 premise liability on an entirely different factual basis than what was set forth in the
11 tort claim.”).

12 Plaintiff’s factual circumstances as presented in the Tort Claim were admittedly
13 limited to the theory that bullets fired in the course of the pursuit and apprehension of
14 Puga “struck” claimants. At no time did the Botten Plaintiffs put the County on notice
15 that their cause of action as to the County Defendants would instead be premised on
16 every single tactical decision made over the course of an hour prior to the shooting, as
17 opposed to the shooting itself.

18 “The claim filing requirement of the Government Claims Act serves several
19 purposes: (1) to provide the public entity with “sufficient information” to allow it to
20 make a “thorough investigation” of the matter; (2) to facilitate settlement of meritorious
21 claims; (3) to enable the public entity to engage in fiscal planning; and (4) to avoid
22 “similar liability” in the future.” *Page v. MiraCosta Community College Dist.*, 180
23 Cal.App.4th 471, 493 (2009) (quoting *Westcon Construction Corp. v. Cnty. of*
24 *Sacramento*, 152 Cal.App.4th 183, 202 (2007))(emphasis added).

25 Plaintiffs’ Tort Claims do not comport with these articulated principles. Based
26 on the Tort Claims presented here, Defendants were put on notice only to investigate
27 the actual shooting. When doing so the obvious would have been discovered –

1 Sergeant Vaccari did not fire any bullets and Deputy Adams was shooting in the
2 opposite direction. As such, the only conclusion to be reached was that none of the
3 bullets fired by County Defendants could have caused the injuries claimed by the
4 Botten's through their tort claim. Based on this information there would have been
5 no need to settle with the Bottens for injuries caused by the bullets of others or to plan
6 for avoiding similar liability in the future. Plaintiffs never put the County Defendants
7 on notice through their submitted claims that what the County Defendants actually
8 should have been investigating is whether the County Defendants utilized poor tactics
9 at any point when they were dealing with Puga in the hour before the shooting, even
10 where those tactics did not cause immediate harm to the Bottens. The test of
11 substantial compliance is simply not met here.

12 **VII. PLAINTIFFS' NEGLIGENT TACTICS THEORIES ARE PURELY**
13 **SPECULATIVE**

14 As set forth in Defendants' moving papers, there is simply no evidence that any
15 tactics by the County Defendants were outside of the realm of reason given the actions
16 of Puga. *Brown v. Ransweiler*, 171 Cal. App. 4th 516, 537-538 (2009) ("As long as
17 an officer's conduct falls within the range of conduct that is reasonable under the
18 circumstances, there is no requirement that he or she choose the 'most reasonable'
19 action or the conduct that is the least likely to cause harm and at the same time the
20 most likely to result in successful apprehension of a violent suspect, in order to avoid
21 liability for negligence").

22 Applied here Plaintiffs merely list several "potential" actions Defendants could
23 have taken that may have led to a different result with Puga, which may have
24 prevented the injury to the Plaintiffs. "[M]ere allegation and speculation do not create
25 a factual dispute for purposes of summary judgment." *Nelson v. Pima Community*
26 *College*, 83 F.3d 1075, 1081-82 (9th Cir.1996); *Golick*, 82 App. 5th at 1148 ("In
27 volatile situations, one can always argue that the arrival of police officers caused
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1 incremental increase in tension at the scene, and thus increased the risk of injury
2 occurring, and whenever tragedy ensues one can argue that a different police response
3 would have produced a better outcome. But this sort of speculative, after-action
4 critique falls short” in subjecting an officer to tort liability for negligence”).

5 As has been stated numerous times, County Defendants did not cause the
6 injuries to the Plaintiffs; no matter what speculative list of actions Plaintiffs put
7 forward as to how the County Defendants could have done better when dealing with
8 Puga. For example, it is purely speculative to assume that SWAT being called would
9 have changed the situation. It is unknown whether SWAT would have responded,
10 arrived in time, or whether they would have done anything differently. The same can
11 be said of the host of other theories Plaintiffs present as to different actions the County
12 Defendants could have taken.

13 **VIII. CONCLUSION**

14 For the aforementioned reasons and the reasons stated in County Defendants’
15 moving papers, County Defendants respectfully request their Motion be granted and
16 Plaintiffs’ First Amended Complaint be dismissed.

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18 DATED: March 6, 2025

LYNBERG & WATKINS
A Professional Corporation

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20
21 By: /s/ Shannon L. Gustafson

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for County Defendants certifies that this brief contains 4,413 words, which:

☐ complies with the word limit of L.R. 11-6.1.

☐ complies with the word limit set by court order dated _____.

DATED: March 6, 2025

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